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Nos. 81-2147 and 81-2188

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, ET AL., PETITIONERS

v.

SAN CARLOS APACHE TRIBE OF ARIZONA and
THE NAVAJO NATION, ET AL.

STATE OF MONTANA, ET AL., PETITIONERS

v.

NORTHERN CHEYENNE TRIBE OF THE
NORTHERN CHEYENNE INDIAN RESERVATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NAVAJO NATION

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QUESTIONS PRESENTED

1. Whether the disclaimer provisions in the federal enabling acts and state constitutions of Arizona and Montana preclude state courts from adjudicating the reserved water rights of Indian tribes in those states.

2. Whether, assuming concurrent federal and state jurisdiction, the Navajo Nation's federal suit, presenting a discrete issue of federal law, should be stayed, for reasons of "wise judicial administration," pending completion of state court proceedings involving more than 58,000 state law claims.

PARTIES IN THE COURT OF APPEALS

1. In the *San Carlos Apache Tribe* case, appellees were: the State of Arizona; John M. Little (individually and as Acting Commissioner of the State Land Department of the State of Arizona); Salt River Valley Water Users' Association; Salt River Project Agricultural Improvement and Power District; City of Phoenix; City of Jerome; Phelps Dodge Corporation; Phelps Dodge Industries, Inc.; Arizona Water Company; Miller Brothers Farms, Inc.; Camp Verde Water Systems; Cottonwood Water Works, Inc.; Copper Basin Water Co.; V Bar V Cattle Co., Inc.; Harold W. Bullard; and a class of all claimants to ownership or use rights to water in the Verde River or its tributaries.

Appellants were the San Carlos Apache Tribe; the Payson Community of Yavapai-Apache Indians; the Salt River Pima-Maricopa Indian Community; and the Fort McDowell Mohave-Apache Indian Community.

2. In the *Navajo Nation* case, appellees were the State of Arizona; the United States of America; Phelps Dodge Corporation; M. L. Hall; M. J. Wiltbank; M. Brown; J. S. Burke; L. Green; and a class of all claimants to ownership or use rights to water in the Little Colorado River Basin.

Appellant was the Navajo Nation.

3. In the *Northern Cheyenne Tribe* case, appellees were the State of Montana and numerous private persons who are listed in 81-2188 Pet. App. 1-22.

Appellants were the Northern Cheyenne Tribe of the Northern Cheyenne Tribe Indian Reservation; the Crow Tribe of Indians; the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation; the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation; the United States of America; and James Bowen.

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BRIEF FOR THE NAVAJO NATION

This brief is submitted on behalf of the Navajo Nation, which was the only plaintiff in *Navajo Nation* v. *United States, State of Arizona, et al.*

OPINIONS BELOW

The opinion of the Court of Appeals in *Navajo Nation* (Pet. App. B-1 to B-4) is reported at 668 F.2d 1100.[1] The order of the District Court in that case (Pet. App. D-1) is not reported.

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 81-2147.

The opinion of the Court of Appeals in *San Carlos Apache Tribe* v. *Arizona* (Pet. App. A-1 to A-13) is reported at 668 F.2d 1093. The opinion of the District Court in that case (Pet. App. E-1 to E-15) is reported at 484 F. Supp. 778.

The opinion of the Court of Appeals in *Northern Cheyenne Tribe* v. *Adsit* (Pet. App. C-1 to C-22) is reported at 668 F.2d 1080. The opinion of the District Court in that case is reported at 484 F. Supp. 31.

JURISDICTION

The judgments of the Court of Appeals were entered on February 22, 1982 in *Northern Cheyenne Tribe*, February 23, 1982 in *San Carlos Apache Tribe*, and February 24, 1982 in *Navajo Nation*. The petition for writs of certiorari in *San Carlos Apache Tribe* and *Navajo Nation* (No. 81-2147) was filed on May 12, 1982, and the petition for a writ of certiorari in *Northern Cheyenne Tribe* (No. 81-2188) was filed on May 21, 1982. The petitions were granted and the cases consolidated on October 4, 1982. The Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATEMENT

I. Introduction

In these cases, which have been consolidated solely for purposes of argument in this Court, the Court is asked to review three judgments of the Court of Appeals. Those judgments in turn involve a total of 12 separate District Court actions. Although all of these 12 actions concern the adjudication of Indian water rights, there are substantial procedural differences among them. Because these differences may well affect the ultimate disposition of each action, it is important to appreciate from the outset the identities of the parties and the relief requested in each case. We therefore begin with a brief description of the several suits and then provide more detail regarding the facts of *Navajo Nation* and the decisions below in that case.

The Court of Appeals' judgment in *Navajo Nation* involves only one lawsuit. In it, the Navajo Indians have sued the United States, the State of Arizona, and six other named claimants as representatives of a class of all claimants of ownership or use rights in the Little Colorado River. The suit seeks only a determination of the Navajos' federal reserved rights in the waters of the Little Colorado River (I J.A. 234-240).

The judgment in *San Carlos Apache Tribe* comprises four suits. In three of them, different Indian tribes sued the State of Arizona and the Commissioner of the State Land Department, seeking to enjoin state administrative proceedings to determine the tribes' federal reserved rights in the waters of the Salt River (I J.A. 5-29, 133-156, 159-169). In the alternative, the tribes sought removal of the state proceedings to federal court.[2] The complaint in the fourth suit in this group is similar in certain respects to *Navajo Nation*. Seeking a declaration of its rights in the waters of the Verde River, the Fort McDowell Mohave-Apache Community sued the State of Arizona, several named claimants, and a class of all persons using or claiming rights in the Verde's waters. In addition, the Fort McDowell Tribe sought damages for losses allegedly suffered as the result of excessive water withdrawals from the Verde River by one of the named claimants (I J.A. 330-338).

The judgment in *Northern Cheyenne Tribe* comprises seven suits. In the first of them, the Northern Cheyenne Tribe sued the State of Montana and all other known claimants of water rights in the Tongue River, Rosebud Creek, and their tributaries. The tribe sought a declara-

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[2] One of the tribes involved in these three actions, the San Carlos Apache Tribe, also filed a separate suit in the District Court, seeking an adjudication of its rights in the Salt River. Contrary to petitioners' representation (81-2147 Pet. Br. 8-10), the District Court has not taken any action in this case, and it was not appealed to the Ninth Circuit.

tion of its rights to the use of all water in the specified river systems (II J.A. 33a-46a).

The remaining six suits were filed by the United States, on its own behalf and on behalf of various Indian tribes (II J.A. 15a-32a, 47a-69a, 82a-109a, 110a-118a, 119a-132a, 133a-149a).[3] In five of the cases, one or more affected tribes sought to intervene (II J.A. 13a, 70a-75a, 76a-81a, 150a-151a, 151a-152a). Named as defendants in each case were the State of Montana and the hundreds of other known claimants of rights in the streams involved. In each case, the United States sought not only a declaration of its rights and the rights of the tribes but also a broader decree establishing the rights of all parties in the river system involved. In some cases, the United States' claims on its own behalf included claims based on state, as well as federal, law.

Petitioners largely ignore these distinctions. Moreover, in the Arizona cases (*Navajo Nation* and *San Carlos Apache Tribe*), petitioners have amalgamated the procedural history of five separate litigations. As a consequence, their narrative not only confuses but, in important instances, misstates the record of *Navajo Nation*. For purposes of clarity, therefore, this brief isolates and discusses the facts of *Navajo Nation*.

II. Navajo Nation

A. *The Treaty of 1868*

The Navajo people now live on the harsh and arid lands of Arizona, New Mexico, and Utah that constitute the Navajo Reservation. Through this economically disadvantaged reservation flow the valuable waters of the Little Colorado River.

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[3] One of the cases involved the Tongue River, Rosebud Creek, and their tributaries (II J.A. 15a-32a). It was consolidated with the Northern Cheyenne Tribe's action (II J.A. 3a).

The Navajos were confined to this reservation by a treaty, dated June 1, 1868, between the United States and the Navajo Nation. 15 Stat. 667; I J.A. 296-306. The area set aside for the reservation excluded most of the Navajos' traditional and best pastureland. The Navajos nevertheless accepted the reservation boundaries as a dramatic improvement over the desolate Bosque Redondo reservation into which the Tribe had previously been herded. That reservation was more than 300 miles east of the Navajos' historic homeland. In the treaty of 1868, the United States returned to the Tribe part of its traditional lands. See U.S. Office of Indian Affairs Report 190 (1867); Exec. Doc. No. 263, 49th Cong., 1st Sess. 15 (1868).

The United States designed the 1868 treaty to end years of war and preserve the peace, not to condemn the Navajo people to perpetual poverty on dry lands. Therefore, as this Court decided in *Winters* v. *United States*, 207 U.S. 564 (1908), such peace treaties reserve for Indian tribes living on a reservation the water necessary for the well-being of the tribes, their crops, and their livestock. See also *Arizona* v. *California*, 373 U.S. 546 (1963).

The treaty vesting these water rights in the Navajo Nation was signed long before Arizona entered the Union. Likewise, the Navajo Nation established its permanent home on the reservation long before Arizona entered the Union.

B. *The Disclaimer Provisions and 28 U.S.C. 1362*

To confirm the exclusivity of federal jurisdiction over Indian lands, and to prevent conflict between new states and long-established sovereign Indian tribes, Congress required Arizona and several other western states (including Montana), as a condition of their admission to the Union, to "forever disclaim" any power or jurisdiction

over Indian lands.[4] In accordance with this congressional mandate, Arizona, Montana, and other states included in their state constitutions an explicit disclaimer provision recognizing Congress' "absolute jurisdiction and control" over Indian lands.[5]

In a more recent effort to protect the Indians' federal rights and to prevent conflict between the states and Indians residing on reservations within the states, Congress in 1966 gave the federal courts original jurisdiction over all civil actions brought by an Indian tribe in which the matter in controversy arises under federal law. 28

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[4] Section 20 of the Federal Enabling Act of June 20, 1910, 36 Stat. 557, 569, provides in pertinent part:

> And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State—
>
> Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States * * *.

[5] Article XX, paragraph 4, of the Arizona Constitution provides:

> The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

U.S.C. 1362.[6] Section 1362 was intended, *inter alia*, to ensure that the tribes would not be required to litigate in the state courts, at least not with respect to rights to tribal lands governed by federal treaties and laws. See H.R. Rep. No. 2040, 89th Cong., 2d Sess. 2 (1966); S. Rep. No. 1507, 89th Cong., 2d Sess. 2 (1966).

The Enabling Act, the Arizona constitutional disclaimer, Section 1362, and a large body of decisional law firmly establish the "policy of leaving Indians free from state jurisdiction and control." *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 168 (1973).

Accordingly, when the Navajo Nation decided to translate its treaty rights into a judicial decree, it sought the protection of the federal courts. It thereby respected the disclaimer set forth in the Arizona Constitution and conformed to existing federal law and policy.

C. *Commencement of this Federal Action*

To establish its rights in the Little Colorado River, the Navajo Nation brought this action in the United States District Court for the District of Arizona on April 17, 1979.

Significantly, the Navajos brought this action themselves, in their own name and on their own initiative. The action was not brought by the United States as trustee for the Navajos. On the contrary, the United States was named as a defendant, along with a class of all other claimants to the waters of the Little Colorado.

Significantly, as well, the Navajos seek in this action only to establish their own rights. They seek a declaration that they are entitled to certain waters of the Little Colorado, and that their entitlement dates back at least to

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[6] 28 U.S.C. 1362 provides:

> The district court shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

the signing of the Treaty of 1868. The Navajos do not seek to adjudicate the water rights of any other claimants to the Little Colorado, or to establish the dates when any such other rights accrued.

Finally, it is significant that the Navajos' claims are based solely on the federal law doctrine of reserved water rights and the 1868 Treaty. The Navajos do not assert any claims under the state law doctrine of prior appropriation or under any other aspect of state law. Moreover, since the Navajos do not seek to adjudicate the rights of other claimants—most of whom do rely on state law—this action turns solely on issues of federal law.

In short, this action presents a discrete, narrow federal claim on behalf of a sovereign Indian tribe. That claim can be swiftly and efficiently adjudicated in federal court. The federal court undisputedly has jurisdiction over that claim, under Section 1362. Congress has required that Arizona disclaim jurisdiction over claims like the Navajos', and Arizona has done so, in its state Constitution.

D. *The Arizona State Court Proceeding*

On April 24, 1979, after this federal lawsuit began, Arizona adopted legislation creating a new state judicial procedure for determining rights to waters located in Arizona. Ariz. Rev. Stat. Ann. §§ 45-241 to 45-259. This legislation purported to commence a state court general stream adjudication to determine the rights of all claimants to waters of the Little Colorado River. The statute did so by automatically converting into state court actions all petitions for water rights determinations previously filed with the State Land Department. Ariz. Rev. Stat. Ann. § 45-258. Such a petition regarding the Little Colorado River had been filed in 1978, although no action at all was ever taken on it.

The Arizona petitioners now assert that there are 58,000 claimants involved in the state court action (81-2147 Pet. Br. 7). Petitioners offer no estimate of how

long it will take the Apache County Superior Court to adjudicate these 58,000 claims, but it is reasonable to expect that the state proceeding will take decades to complete. Indeed, the record below is barren of any evidence that the state proceeding has even started, except in the most formalistic sense. In the more than two years from the "commencement" of the proceeding to the argument of this action in the Ninth Circuit, nothing happened: no judge was assigned, no parties were served, no procedural steps of any kind were taken. The state proceeding, in short, consisted of nothing more than a petition gathering dust in a file.

Nevertheless, Arizona contends that the Navajos' federal claim should, in the name of "wise judicial administration," be mired in this Dickensian state proceeding, rather than disposed of rapidly in the federal court. Petitioners take this position even though the relevant state statute itself contemplates that separate judicial decrees resolving individual water claims can and will be incorporated into the state proceeding. See Ariz. Rev. Stat. Ann. § 45-257(B)(1).

E. *The District Court's Stay Order*

On July 27, 1979, Arizona moved to dismiss the Navajos' amended complaint in the federal action. Arguing that this case is controlled by *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976) (*"Akin"*), Arizona contended that the Indians' narrow federal claim should be adjudicated in the Arizona state proceeding. The Navajo Nation opposed the motion to dismiss, arguing that it has a right to a federal forum for its federal claim.

On April 17, 1980, the District Court denied Arizona's motion to dismiss, thereby recognizing that it had jurisdiction over the claim and that the amended complaint

stated a good cause of action. At the same time, however, the District Court entered an order staying the federal action pending determination by the Arizona state courts of the various rights of the 58,000 claimants to the waters of the Little Colorado.

The District Court took that action *sua sponte*. No party to this case had sought, or even suggested, a stay. The prospect of a stay had never been argued; its implications had never been explored. The stay order was not accompanied by any findings or any opinion. The District Court neither explained the grounds for staying the federal action nor cited any authority for its action.

F. *The Ninth Circuit's Decision*

The Ninth Circuit reversed and remanded the District Court's order. It did so because Arizona, in its state Constitution, has disclaimed jurisdiction over Indian water rights claims, as required by the federal Enabling Act. Arizona had argued that the disclaimer does not apply to water rights cases. Arizona had also argued that the McCarran Amendment to the 1953 Department of Justice Appropriation Act, 43 U.S.C. 666, which waives the sovereign immunity of the United States in water rights cases, vitiates the disclaimer.[7] Relying on

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[7] The McCarran Amendment provides in pertinent part:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having

the companion decisions in *San Carlos Apache Tribe* and *Northern Cheyenne Tribe*, the Ninth Circuit rejected both arguments.

According to the Ninth Circuit, the disclaimer can be disregarded only if it has been repealed in a manner consistent with both federal law and Arizona's own procedures for amending its Constitution. The Ninth Circuit remanded the case to the District Court for a determination whether such a repeal has been effected.

The Navajo Nation had argued in the alternative that it should be permitted to proceed in federal court regardless of the disclaimer, because federal court abstention under *Akin* is not warranted. The Ninth Circuit did not expressly decide the abstention issue in *Navajo Nation*. However, in the companion case of *Northern Cheyenne Tribe*, the court held that abstention is indeed unwarranted. Likewise, in *San Carlos Apache Tribe*, the Ninth Circuit, without deciding the issue, said that the case was significantly different from *Akin*. The Court of Appeals thus foreshadowed its probable determination of the abstention question in *Navajo Nation*, should that issue ever have to be decided.

SUMMARY OF ARGUMENT

The Navajo Indians should be permitted to vindicate their federal reserved water rights in federal court. The pendency of a general stream adjudication in state court should not affect the availability of a federal forum for the Indians' claims.

These are the fundamental principles that should be established here. To be sure, the parties have addressed

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jurisdiction, and may obtain review thereof, in the same manner and to the same extent as private individuals under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

themselves to several complicated issues of historical interpretation and statutory construction. But these detailed arguments should not be allowed to obscure the real question before the Court. Federal jurisdiction, after all, is not contested. No party suggests that the district court lacks the power to hear the Indians' claims. The only question is whether, notwithstanding the conceded federal jurisdiction, the doors of the federal courts should be closed to the Navajos and other tribes seeking to protect and enforce their federal water rights.

When all the verbiage and legal niceties are cut away and the question is viewed in this simple form, the answer becomes clear. The federal courts should remain the exclusive, or, at the very least, the principal, forum for the adjudication of Indian water rights.

The critical facts are not in any serious dispute. The United States by treaty has guaranteed the Navajos the water rights they now seek to defend. The rights at stake are undeniably federal rights. The United States by treaty has established the Navajo reservation, and the Navajos have agreed to be subject to the laws of the United States. The Tribe has never agreed to be subject to state laws or state jurisdiction.

In recognition of the exclusively federal character of Indian law, Congress required many western states, as a condition of their admission to the Union, to disclaim all jurisdiction over Indian lands. Arizona is such a state. In compliance with the congressional mandate, Arizona included in its state constitution a provision disclaiming jurisdiction over Indian lands and acknowledging that such lands shall remain "under the absolute jurisdiction and control of the Congress of the United States." More recently, Congress explicitly ensured the Indian tribes a federal forum for the resolution of controversies arising under federal law. 28 U.S.C. 1362.

The Navajos have now invoked this federal jurisdiction in suits for a determination of the tribe's federal water rights. The substantive issues to be litigated are exclusively issues of federal law. The construction of a United States treaty is at issue. Even apart from such a treaty, questions of Indian land and water rights are, and have historically been recognized as, federal questions to be resolved by the federal courts. With the enactment of Section 1362, Congress has confirmed and perpetuated this historical understanding and has expressly granted the tribes the right independently to seek relief in the federal courts.

For all these reasons, the Navajos' claims to the waters of the Little Colorado River should be adjudicated in federal court. The Navajos' federal action should not be stayed in deference to state proceedings. This conclusion is supported by two separate lines of argument. In the first place, because of the disclaimer provisions in both federal and state law, the Arizona state courts lack jurisdiction to adjudicate Indian water rights. The federal courts, therefore, are the only courts that can decide the Indians' claims. Second, even if the Arizona courts had the power, in some circumstances, to determine the Indians' federal rights, that power should not displace the federal courts' traditional role as the principal forum for the enforcement and protection of those rights. Congress' promise of a federal forum for the resolution of Indian claims should not be overridden here by the mere filing in state court of a request for a general stream adjudication. This Court's decision in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976) ("*Akin*"), does not require any such result. On the contrary, application of the criteria identified by this Court in *Akin* mandates the exercise of federal jurisdiction in the *Navajo Nation* case.

ARGUMENT

I

FEDERAL AND STATE DISCLAIMERS OF JURISDICTION PROHIBIT THE ARIZONA STATE COURTS FROM ADJUDICATING INDIAN WATER RIGHTS

Like all other respondent Indian tribes, the Navajo Nation contends that the disclaimer provisions in the federal Enabling Acts for Arizona and Montana and the corresponding provisions in the Arizona and Montana Constitutions preclude state courts in those states from exercising jurisdiction over federal reserved water rights held by Indian tribes. On this point, the Navajo Nation adopts and incorporates the argument of the Salt River Pima-Maricopa Indian Community, which was prepared through consultation among counsel for several respondent tribes, including the Navajo.

II

EVEN ASSUMING CONCURRENT STATE JURISDICTION, THE FEDERAL COURTS SHOULD ADJUDICATE INDIAN RESERVED WATER RIGHTS

Even if we assume that Arizona's courts have concurrent jurisdiction over Indian water claims, the Ninth Circuit properly vacated the stay entered below. As the Ninth Circuit made clear in its companion opinion below in *Northern Cheyenne Tribe* (Pet. App. C-1 to C-22), this is not one of those "exceptional" and rare cases subject to the narrow abstention rule of *Akin*. Rather, this is the more typical case where, in the words of *Akin*, the federal courts should discharge their "virtually unflagging obligation * * * to exercise the jurisdiction given them." 424 U.S. at 817.

Navajo Nation—unlike some of the cases consolidated for argument here—is an action in which a single Indian tribe has invoked the jurisdiction of a federal court for the sole purpose of obtaining an adjudication of its own federal rights. This is not a case in which a tribe seeks

to enjoin state water proceedings or in which the United States or a tribe initiates a general stream adjudication in federal courts. Whatever may be the appropriate disposition of such matters, cases like *Navajo Nation* should go forward in federal court. The particular factual circumstances presented here only reinforce this general conclusion.

Petitioners maintain that this Court's decision in *Akin* requires federal courts, even in cases like *Navajo Nation*, to defer to state general stream adjudications (81-2147 Pet. Br. 33-46; 81-2188 Pet. Br. 38-43). Petitioners concede federal jurisdiction over the Indians' suit, but they nevertheless contend that federal courts must bow to their state counterparts in the determination of the Indians' federal rights.

For its part, the United States asks for "clarification of the *Akin* rule" (U.S. Memorandum 16). In the federal government's view, "the rule everywhere should be that, regardless whether the Tribe or the United States is the moving party, a federal court whose jurisdiction is timely invoked to determine the existence and extent of Indian Reservation water rights should proceed to decide that discrete federal question so long as this does not materially delay the adjudication of the overall controversy" (*id.* at 17).

We would welcome adoption of the government's proposal. But whether the Court is inclined to grant the government's request for a "bright line" rule of easy applicability or whether it prefers to proceed on the basis of a case-by-case evaluation of the relevant factors identified in *Akin*, the Navajos' suit should be heard in federal court. The reasons for the government's proposed rule are substantially similar to the distinctions between *Navajo Nation* and *Akin* that justify a different result here. Accordingly, after a brief review of *Akin* itself, we enumerate and discuss the various factors that militate in

favor of the retention of federal jurisdiction in this case, whether under the *Akin* standards or under the revised standards proposed by the government.

A. The Akin Decision

By the Court's own assessment, *Akin* is an "exceptional" case (424 U.S. at 818). It is one of the rare instances in which this Court has approved a departure from "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" (*id.* at 817). The factual circumstances which the Court relied upon for the extraordinary outcome in *Akin* are simply not present in *Navajo Nation.*

Akin was an action brought by the United States as trustee for the Indians. The United States asked the federal court to assume general jurisdiction over the portions of seven rivers located in Colorado, and to adjudicate *and* administer *all* claims of *all* claimants of those waters (I J.A. 243-261). Numerous state law claims were covered by the complaint. This Court expressly noted the "extensive involvement of state water rights" in *Akin* (424 U.S. at 820).

Moreover, a viable state court proceeding for a general stream adjudication of the very waters at issue in *Akin* was actually going forward in the Colorado state courts. 424 U.S. at 804, 806, 824. Prior to commencing the federal action, the United States had participated as a party to proceedings in the Colorado state courts for the adjudication of rights to waters located in other parts of Colorado. *Id.* at 806.

In these circumstances, the Court held that it would be wasteful and would serve no useful purpose to permit the federal action to go forward. The Court emphasized that the federal action was no more and no less than a duplication of the Colorado state proceeding, which was first in time and was already making significant progress.

Again and again, the Court stressed that its decision was limited to the factual situation presented in *Akin* (see 424 U.S. at 817, 818, 819, 820). In the Court's words, "[o]nly the clearest of justifications will warrant dismissal" of a federal action that is within the statutory jurisdiction conferred by Congress.

For present purposes, it is particularly important to keep in mind what *Akin* did *not* hold:

(1) *Akin* did not hold that the federal courts should abstain as a matter of course from deciding any federal water rights claim that could be adjudicated as part of a state court general stream adjudication. On the contrary, the Court expressly held that such abstention is appropriate only in "exceptional" circumstances.

(2) *Akin* did not decide that a federal action may be dismissed in deference to a state general stream adjudication that has commenced in name only. On the contrary, the Court indicated that an "inadequate" state proceeding is not entitled to deference (424 U.S. at 820).

(3) *Akin* did not hold that a federal action seeking only an adjudication of federal rights, and raising no issues of state law, may be halted in deference to a state court action. On the contrary, the Court suggested that, had "the involvement of state water rights [been] less extensive" in that federal action, deference to the Colorado state proceeding might have been inappropriate.

(4) *Akin* did not decide that a federal action brought by an Indian tribe under 28 U.S.C. 1362 may be dismissed in deference to a state court action. On the contrary, the Court expressly reserved the question whether dismissal in the name of "wise judicial administration" would *ever* be appropriate in "a water suit brought by a private party in federal district court" (424 U.S. at 820 n.26).

With this background, we turn to the long list of reasons why the Navajos' reserved water rights should be adjudicated in federal court.

B. 28 U.S.C. 1362 and the Historical Tradition of Federal Jurisdiction

The first, simplest, and most compelling reason for permitting the Navajos' suit to proceed in federal court is that Congress has promised the Indians a federal forum to hear their claims. In 1966, Congress enacted 28 U.S.C. 1362, the jurisdictional provision on which the Navajos' federal action is based. Section 1362 grants the federal district courts original jurisdiction of all civil actions brought by any Indian tribe, in which the matter in controversy arises under federal law. As this Court recognized (424 U.S. at 820 n.26), Section 1362 was not involved in *Akin*, because the plaintiff there was the United States. By enacting Section 1362, Congress manifested its intention to guarantee Indian tribes access to the federal courts.

This congressional purpose is reflected in the committee reports on Section 1362. The Senate Judiciary Committee noted the "great hesitancy on the part of tribes to use State courts." S. Rep No. 1507, 89th Cong., 2d Sess. 2 (1966). The Committee explained (*ibid.*):

> This reluctance is founded partially on the traditional fear that tribes have had of the States in which their reservations are situated. Additionally, the Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years.

As Assistant Secretary of the Interior Anderson succinctly wrote to Senator Eastland, "The issues involved are Federal issues and the tribes should not be required to conduct the litigation in the State courts" (*id.* at 3).[8]

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[8] The House Judiciary Committee echoed these views:

> In its report to the Senate Committee, the Department of the Interior specifically pointed out that the issues involved in cases involving tribal lands that either are held in trust or were so held by the United States or are held by the tribe subject

In addition, both the Senate and House Committees observed that enactment of Section 1362 "would provide for U.S. district court jurisdiction in those cases where the U.S. attorney declines to bring an action and the tribe elects to bring the action." H.R. Rep. No. 2040, 89th Cong., 2d Sess. 2 (1966); see also S. Rep. No. 1507, *supra*, at 2. The Senate Report explained that the United States' right to bring civil actions on behalf of Indian tribes is "insufficient" when the interest of the federal government as guardian of the Indian tribes conflicts with its interest as federal sovereign (*ibid.*).

The lesson to be derived from this legislative history is clear. Congress sought once and for all to remove any remaining obstacles to federal jurisdiction over federal claims asserted by Indian tribes.

Section 1362 did not arise in an historical vacuum. It was an outgrowth of both the longstanding tradition of exclusive federal jurisdiction over Indian Affairs and the more recent trend toward tribal self-determination.

Numerous decisions of this Court recognize the tribes' historical immunity from state jurisdiction. See, *e.g.*, *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1866); *United States* v. *Kagama*, 118 U.S. 375, 384 (1886); *Rice* v. *Olson*, 324 U.S. 786, 789 (1945); *Williams* v. *Lee*, 385

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to restriction against alienation imposed by the United States are Federal issues. The Department therefore observed that *particularly as to this class of cases it is appropriate that the actions be brought in a U.S. district court.* In its statement to the Senate committee, that Department referred to the unique governmental status of Indian tribes and the unique relationship which exists between them and the Federal Government. This is a relationship often affected by treaties and *the Department of the Interior indicated that a tribe's desire to have a Federal forum for matters based upon Federal questions is justified.*

H.R. Rep. No. 2040, 89th Cong., 2d Sess. 2 (1966).

U.S. 217, 219-220 (1959); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 174-175 (1973); *Bryan* v. *Itasca County*, 426 U.S. 373, 381 (1976); *Ramah Navajo School Board* v. *Bureau of Revenue*, 102 S. Ct. 3394, 3398-3399 (1982). This traditional principle is also embodied in the numerous enabling act and constitutional disclaimer provisions and in many treaties between Indian tribes and the United States. The Navajo Treaty of 1849, for example, states (9 Stat. 974) that

> the said tribe was lawfully placed under the exclusive jurisdiction and protection of the government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection.

The Apache treaty of 1852 contains a similar provision (10 Stat. 979). Even Public Law 280, 67 Stat. 588, the apogee of congressional efforts to "assimilate" Indian tribes, expressly preserved exclusive federal jurisdiction over Indian land disputes and water rights claims.

Section 1362, enacted 14 years after the McCarran Amendment, confirms and perpetuates the historical preference for a federal forum to resolve Indian claims. In addition, the statute advances the cause of Indian self-reliance by authorizing the tribes to sue in federal court on their own behalf.

Although interrupted in the 1950's by Public Law 280, the trend toward increased Indian independence and self-determination traces its origins to the New Deal era. The Wheeler-Howard Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, was intended "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). Congress decided to "turn[] over to the Indians a greater control of their own destinies." *Id.* at 553. As President Roosevelt wrote to Representative Howard in

1934, "This is but the obligation of honor of a powerful nation toward a people living among us and dependent on our protection." H.R. Rep. No. 1804, 73d Cong., 2d Sess. 8 (1934).

Section 1362 represents a continuation of this trend. It demonstrates the vitality of the congressional commitment to the Indian tribes' prerogative of handling their own affairs. In light of this legislative pledge to provide a federal forum for litigation initiated by the tribes, this Court has liberally construed the jurisdictional grant in Section 1362. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974); *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

Given this historical background, the Court should not deprive the Navajos and other tribes of the federal forum promised by Section 1362. As long ago as 1849, Congress and the Navajos agreed that the tribe would be subject exclusively to federal authority and protection. That agreement was renewed and enhanced through the enactment of Section 1362. The Indians should not now be denied what Congress has given its word to provide. The Nation's "obligation of honor" in dealing with a dependent tribe is at stake.

C. Federal Adjudication of the Navajos' Claim Will Not Waste Judicial Resources or Materially Delay Adjudication of the Overall Controversy

Akin's concern for avoiding wasteful litigation does not impede the exercise of federal jurisdiction in the *Navajo Nation* case. Nor will federal adjudication of the Navajos' claim cause a material delay—or any delay—in the general state adjudication of claims to the Little Colorado. Hence, under the standards of *Akin* or the standards proposed here by the government, the *Navajo Nation* case should proceed in federal court.

In *Akin*, the United States was in substance urging that the federal court do precisely what the Colorado

state courts already were doing—untangling all the many state and federal claims and priorities of a multitude of claimants to the same waters. By contrast, the Navajo Nation does not ask the federal court to determine the claims of any other water user, to decide any state-law questions, to assume general jurisdiction over all claims to certain waters, to appoint a water master, or to undertake the burden of administering any water rights. In the *Navajo* case, a single claimant with a unique, narrow federal claim seeks only to have its own federal rights (and no others) declared in federal courts.

There is no reasonably foreseeable danger that this federal action will duplicate or delay state proceedings or waste judicial resources. While the Navajo claim proceeds in federal court, the state court can move forward to assess, quantify, and rank the 58,000 state claims.[9] The Navajo federal action will be concluded long before the state court has finished its task. Petitioners have not suggested otherwise. After the rights of the Navajo Nation have been determined in federal court, Arizona can simply incorporate the federal judgment in the State's general stream adjudication and then list the Tribe at its proper place in the hierarchy of claimants

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[9] After the Ninth Circuit reached its decision below, the state court itself stayed the state proceeding—which in any event, had never really been started—pending federal court resolution of the jurisdictional issues involving the Navajos. This result was reached without request by, or notice to, the Navajos. Presumably the state court wishes to know, before going forward, whether the Navajos will or will not be part of the state proceeding. However, not even the state court has suggested that it will abort the state proceeding if it is ultimately determined that the Navajos are not subject to its jurisdiction. On the contrary, in the companion *San Carlos Apache* case, the state court, while entering a similar stay, authorized the Department of Water Resources to "continue to investigate, gather, prepare and process information" on all claims except the claims of the Indians (Pet. App. G-2). And, in the Montana cases, the state Supreme Court denied the federal government's request to stay the state general adjudication, pending the disposi-

to the Little Colorado River. See Ariz. Rev. Stat. Ann. § 45-257(B)(1).[10]

Indeed, this federal action may actually help conserve judicial resources. The Little Colorado River is an interstate stream, and adjudication of the Navajo Nation's water rights in one sharply focused federal action will avoid the need for state courts in both Arizona and New

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tion of this case. 81-2188 Pet. App. 143-144. In short, the states may proceed with respect to all but the Indian claims if they wish to do so.

[10] Petitioners' suggestion (81-2147 Pet. Br. 38; 81-2188 Pet. Br. 33-35) that the Navajos and other tribes will find it difficult or impossible, in federal actions, to identify and join all claimants to a particular stream is without merit. The Navajos and the Fort McDowell Tribe have brought their federal suits as defendant class actions precisely to avoid this problem. The defendant class action device has already been approved in federal water rights litigation. See *United States* v. *Truckee-Carson Irrigation District*, 71 F.R.D. 10, 13-18 (D. Nev. 1975), cert. granted to review judgment of court of appeals on other grounds, 103 S. Ct. 205 (1982).

Moreover, and more important, the idea that the tribes will be unable to identify and join all claimants in federal court but that the states will be able to do so in state court is preposterous on its face. If state officials have compiled or will compile a service list of all claimants to a particular stream in connection with a state general adjudication, there is no reason why that list cannot be consulted as a guide for notifying claimants in a tribe's federal action. Indeed, when a tribe commences its federal action either before or promptly after the beginning of a state general adjudication, it should be possible to notify all claimants in both actions simultaneously.

Similarly, there is no merit to the assertion by petitioners and some amici that the position advocated by the Navajos and the federal government would require all claimants to participate actively in both federal and state actions (see, *e.g.*, 81-2188 Pet. Br. 36; Wyoming Amicus Br. 19-20). As the present litigation demonstrates, the practical reality is that, in a federal action to adjudicate an Indian tribe's federal reserved water rights, the common position of state law claimants will be advocated by the State itself or by one or more corporate or institutional water users. Accordingly, individual claimants of state appropriated rights will ordinarily find it unnecessary to appear separately in federal court to contest the Indians' claims.

Mexico to address the same subject, with the attendant possibility of conflicting results. Moreover, because the Navajo Nation's reserved rights arose at an early date and encompass a very substantial portion of the Little Colorado's waters, a prompt federal declaration of those rights might well persuade many potential parties to the state general stream adjudication to forgo prosecution of their claims.

D. The Navajos' Suit Involves Only Federal Issues

The Navajo Nation's rights to the waters of the Little Colorado depend exclusively on federal law. The principal sources of the Navajos' rights are the 1868 Treaty and the federal doctrine of reserved water rights. As Congress and this Court have recognized, federal courts have more experience and expertise than state courts in dealing with Indian treaty questions and the related body of federal precedents. See, *e.g.*, S. Rep. No. 1507, *supra*, at 2; *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 673-674 (1979). That is the only kind of question that the Tribe asked the District Court to address in this case. The "extensive involvement of state water rights" that troubled the Court in *Akin* is not present here. Indeed, no state-law issue of any kind is involved.

E. Reserved Indian Water Rights Must Be Determined Separately, Even in General Stream Adjudications

As the government has correctly observed (U.S. Memorandum 18), reserved Indian water rights are different from rights acquired under the state doctrine of prior appropriation. Historically, water rights in the western states have been created by diversion of water from a stream and application of that water to a beneficial use. In times of shortage, persons who have begun their use first have enjoyed priority over subsequent appropriators. The reserved water rights held by Indian tribes are independent of this system. They are based on federal law and are not predicated on actual diversions of water or

its beneficial use. The rights of an Indian tribe arise no later than the date of the reservation and are measured by the amount of acreage that is reasonably irrigable. See *Winters* v. *United States*, 207 U.S. 564, 575-578 (1908); *Arizona* v. *California*, 373 U.S. 546, 598-601 (1963).

Because of the different sources of reserved and appropriated water rights, the determination of an Indian tribe's reserved rights in a stream inevitably entails an inquiry different from the one that governs the vast majority of state law claims. The question is not what quantity of water was put to a beneficial use on a given date, but what are the present and future needs and prospects of the Indian reservation measured in terms of irrigable acreage.

Accordingly, whether Indian water rights are determined in a narrow federal lawsuit brought by a tribe (or by the United States acting on the tribe's behalf) or as part of a state general stream adjudication, a separate proceeding will be required to hear and evaluate the relevant evidence concerning the irrigability of reservation lands and the amount of water needed for effective irrigation. Petitioners' persistent efforts to characterize the Navajo Nation's federal action as "piecemeal adjudication" to be avoided at all costs thus ignore the realities of water litigation. The simple fact is that the Indians' claims are unrelated to the state-law hierarchy of appropriated rights and do not depend on any of the evidence needed to establish those rights. Any court, state or federal, would need to address the Indians' claims separately.

Indeed, the government has reported (U.S. Memorandum at 18 n.21) that, in a current Wyoming general adjudication, the Water Master appointed by the state court severed for a separate trial, before the remainder of the proceeding, the quantification of rights reserved for the Wind River Indian Reservation. *In re: The General Adjudication of All Rights to Use Water in the Big*

Horn River and All Other Sources, State of Wyoming, Civ. No. 4993. Left completely to its own devices, the state court did, for obvious reasons, precisely what petitioners regard as anathema: it treated separately the separate issue of an Indian tribe's reserved federal rights.

None of this should be particularly surprising. Even the most comprehensive general stream adjudication cannot possibly attempt to resolve all legal questions that may be relevant to rights in a stream. A state court cannot hope to adjudicate all rights in an interstate or international river such as the Little Colorado. Similarly, a general stream proceeding cannot be expected to resolve competing claims to the ownership of each individual appropriated right. If two heirs disagree over which is entitled to receive a decedent's water rights, that dispute would presumably be settled in a probate court, not a general stream adjudication. If a divorcing couple disagrees over which party will retain ownership of water rights held in common, that matter would presumably be addressed in a divorce proceeding, not a general stream adjudication. At the Senate hearings on the McCarran Amendment, Senator Watkins and two witnesses explicitly discussed the possibility of a dispute among stockholders over the right to control corporately held water rights. They agreed that a general stream adjudication would not attempt to resolve such a dispute or to determine who the rightful stockholders of a corporation are. *Adjudication of Water Rights: Hearings before a Subcommittee of the Senate Committee on the Judiciary*, 82d Cong., 1st Sess. 24-25 (1951) (hereinafter, "Senate Hearings").

In all such matters, the conflicting claims would be resolved in separate (*i.e.*, "piecemeal") litigation, and the resulting judgment would be incorporated in the state court general stream adjudication. So too here. The Navajos' federal claim can (and must) be adjudicated in federal court. That will not duplicate or fragment the Arizona proceeding. The state court meanwhile remains

free to decide the multitude of state law claims at issue in the state general stream adjudication; it can incorporate the federal court's judgment by listing the Navajo Nation at its proper place in the hierarchy of claimants, and administer water rights in accordance with that list. Indeed, the legislation creating the Arizona general stream adjudication contemplates precisely this procedure. It provides that "when rights to the use of water or dates of appropriation have previously been determined in a judgment or decree of a court, [the court handling the general stream adjudication shall] accept the determination of such rights and dates of appropriation as found in the judgment or decree * * *." Ariz. Rev. Stat. Ann § 45-257(B)(1).

In short, even a general stream adjudication is not intended to settle all conceivable issues related to the right to use water from a given source. Some "piecemeal adjudication" is inevitable, if that epithet is applied as loosely as petitioners would have it. The critical point here is that reserved Indian rights, by their nature, must be determined separately regardless of the forum, and there is therefore even less justification than there otherwise might be for shifting the Navajos' federal claims to state court.

F. The State Proceedings in These Cases are "Inadequate" to Handle the Indians' Federal Claims

In emphasizing the narrowness of its holding in *Akin*, this Court strongly suggested that federal deference to state proceedings would be inappropriate where those proceedings are "in some respect inadequate to resolve the federal claims" (424 U.S. at 820). Here, the state proceedings are so unwieldy and so subject to extraordinary delay that they simply are not a viable alternative for determining the Indians' rights.

A prompt judicial decree is of special urgency for the Navajos and other tribes, because effective economic de-

velopment of reserved waters cannot occur before the resolution of questions about the extent of the Indians' rights. Yet, in the more than two years from the commencement of the Arizona proceeding on the Little Colorado to the argument of these federal cases in the Ninth Circuit, the state proceeding made no progress whatsoever. No judge was appointed; no party appeared; not a single event of any kind occurred. Indeed, not one of the 58,000 potential claimants to the Little Colorado was even served with process. Created by legislative fiat, the proceeding was an empty shell with no discernable purpose other than to justify the *Akin* argument made by petitioners in this case.[11]

Nor will the completion of service necessarily signal the start of meaningful proceedings in the state courts. The Salt River and Verde River proceedings have been consolidated with the proposed general adjudication of rights to the Gila River. Arizona concedes that, even to this day, more than three and a half years after the Salt River and Verde River proceedings began, not one of the 80,000 potential claimants to the Verde's waters has been served (81-2147 Pet. Br. 7 n.8). The dormant state of those proceedings, and the enormous time that will be required to complete them if they ever arise from their slumber, is of special concern to the Navajo Nation. For the suggestion has been made that the general adjudication of all rights in the Gila, Salt, and Verde Rivers should be *completed* before the Little Colorado proceeding

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[11] The State now purports to have accomplished service of process (81-2147 Pet. Br. 7). However, there is no record support for this assertion; and any such service of process—occurring *after* this case was argued in the Court of Appeals and in response to arguments made by the Navajos in the Court of Appeals—can hardly turn the lifeless Arizona proceeding into a vital, on-going litigation like the Colorado proceeding in *Akin*. It is only the latter kind of proceeding which, this Court held in *Akin*, may, in certain circumstances, require deference from the federal courts. The slumbering Arizona proceeding is entitled to no such deference.

is permitted to go forward (I J.A. 319-320). When and if the state adjudication of the Little Colorado begins to lurch ahead, it will take many years, if not decades, to adjudicate the tens of thousands of claims at issue.

Even if it operated with exemplary efficiency, the Arizona general adjudication could not aspire to do more than declare the Tribe's rights in the Arizona portion of the Little Colorado. A second state proceeding in New Mexico would then be required to finish the job that a single federal court can do.

The current Arizona proceeding therefore is not "adequate" to serve the Indians' legitimate needs. The Navajos' narrow federal claims should be swiftly determined in federal court, where Congress has entitled the Indians to proceed and where a binding decree can declare the Tribe's rights on the entire interstate stream.

G. The Navajos' Federal Action Avoids Possible Conflicts of Interest

If the Indian tribes cannot obtain a federal determination of their reserved water rights, they will be compelled either to rely on the representation of the United States in state proceedings or to appear in such proceedings to defend their own interests. It would be unfair to put the tribes to this choice.

The tribes have not waived their sovereign immunity from suit in state court. That point is not disputed. Ordinarily, therefore, a tribe could not be compelled to appear in a state general stream adjudication. If petitioners' position were accepted, however, the only alternative would be representation of the Indians' interests by the United States. That poses problems of its own.

Frequently, if not always, the United States seeks to advance multiple interests in a given stream. The govern-

ment may, for example, claim reserved water rights for national parks, national forests, and military reservations. In this situation, the Indians' claims would be only one of several interests being advanced by the federal government. When those interests cannot all be fully satisfied (*i.e.*, when there is too little water for all the reserved rights claimed), the government would be placed in an awkward position, and the tribe would lack assurance that its interests were being pressed with undiluted vigor. The tribe could protect its own rights only by subjecting itself to the jurisdiction of the state court.

The Court of Appeals described the inequity of such a dilemma in the following terms (Pet. App. C-16 to C-17):

> In the present case, the Indian tribe appears to be a necessary party to the state court proceeding, yet neither Congress nor the Tribe has consented to such a suit in state court. Under these circumstances, where the sovereign immunity of the Tribe has not been waived, and there is a conflict of interest between the Tribe and the United States, the Tribe could only protect its rights by intervening, at the expense of its basic right to sovereign immunity. We will not put the Tribe to this Hobson's choice.
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> * * * Our examination of this conflicts factor leads us to conclude that it would not be wise or appropriate for the federal court to give up its traditional jurisdiction and defer to the state court in this case.

The Ninth Circuit's reasoning is reinforced, of course, by the policies underlying Section 1362. As we have already seen, that statute was enacted to ensure the availability of a neutral federal forum for the resolution of Indian claims. The legislative purpose would be frustrated if the Indians now could be forced to litigate their water claims in state court.

H. Federal Actions Like Navajo Nation Are Not Barred by the Sovereign Immunity of the United States

The government asserted in the Ninth Circuit that the McCarran Amendment's waiver of sovereign immunity extends only to general stream adjudications and that, therefore, the United States may not be joined as a defendant in *Navajo Nation* or any suit intended solely to adjudicate an Indian tribe's water rights in federal court. See U.S. Br. in *Navajo Nation*, at 3-8. The government did not press this point in the District Court, and it does not advance it here. The Arizona petitioners, however, now embrace this argument (81-2147 Pet. Br. 38-39); they assert that a determination of Indian rights in federal court will not bind the United States and hence will compel the relitigation of the Indian claims in a general stream adjudication in which the United States is a non-immune party. The contention is erroneous.

The McCarran Amendment's waiver of sovereign immunity is not limited to general stream adjudications. The principal purpose of the Amendment was to ensure that the United States could be bound in water suits like other litigants, not to insist that *all* rights in a stream be adjudicated in a single proceeding. The McCarran Amendment grants consent to join the United States as a defendant in "*any suit* * * * for the adjudication of rights to the use of water of a river system or other source" (emphasis supplied). The language of the statute does not require a general stream adjudication, and no such restriction is fairly implied.

The sketchy legislative history of the McCarran Amendment contains several indications that Congress did not intend to limit its waiver of sovereign immunity to general stream adjudications. First, the exchanges between Senator Watkins and the Department of Justice representative at the Senate hearings, Mr. Veeder, concerned several specific cases, in one or more of which no general stream adjudication appears to have been

sought. Senate Hearings, *supra*, at 2-3, 13. Indeed, Mr. Veeder expressed the fear that the United States would be repeatedly called into state court by a series of individual claimants seeking to adjudicate their narrow claims. *Id.* at 6. Deputy Attorney General Ford cautioned Senator McCarran that adoption of the Amendment "would result in the piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions, and the joinder of the United States in many actions" (*id.* at 67; S. Rep. No. 755, 82d Cong., 1st Sess. 7 (1951)). The Deputy Attorney General obviously believed that the Amendment would waive sovereign immunity in all water rights suits, not only in general stream adjudications. The Department of the Interior recommended that the Amendment be limited to general stream adjudications, but no change was made in the Amendment's language. Senate Hearings, *supra*, at 67-68; S. Rep. No. 755, *supra*, at 8.

Senator McCarran himself made it clear that his bill contemplated suits to adjudicate the rights of an individual claimant. After the Senator's bill, S.18, passed the Senate, it was incorporated by the House of Representatives into the 1953 Department of Justice Appropriation Act. The appropriations bill came to the Senate after passage in the House, and the subject of the McCarran Amendment arose in the ensuing Appropriations Committee hearings. In an exchange with Solicitor General Perlman, Senator McCarran explained the purpose of his proposal, using himself as an example:

> I am an owner of a water right on the Truckee River. It has a priority of 1860. In order for me to adjudicate my water rights, if I were to attempt to, if they were in doubt, I would have to bring, if the Government owned land on the Truckee River to which a water right applied, I would have to bring the Government in. I couldn't ever adjudicate my water right, because I have got to bring in all the water users of that system. That is all this S.18

> does, to provide that the Government of the United States be brought into court to determine its water rights if, as, and when it has water rights on a certain system.

Hearings on H.R. 7289 before the Subcommittee of the Senate Committee on Appropriations, 82d Cong., 2d Sess. 1349 (1952).

The only piece of legislative history that arguably suggests that the McCarran Amendment's consent to suit applies only in general adjudications is a letter from Senator McCarran to Senator Magnuson written after the conclusion of the first Senate hearings. The letter was intended to allay Senator Magnuson's fear that the McCarran Amendment would permit suits against the United States to enjoin federal reclamation projects. Senator McCarran explained that the Amendment

> is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

S. Rep. No. 755, *supra*, at 9. Especially in light of their context, Senator McCarran's remarks are fully consistent with the proposition that the McCarran Amendment requires the joinder of all potential claimants, but not necessarily the simultaneous adjudication of all rights, in a stream.

Senator Magnuson was worried about efforts to block governmental water projects through suits against the United States alone. Senator McCarran responded that the Amendment would authorize joinder of the United States as a defendant only where all potential claimants of water rights would be bound by the resulting decree.

The participation of all claimants, not the adjudication of all claims, is the key to the successful operation of the McCarran Amendment and the avoidance of the undesirable suits opposed by Senator Magnuson.

For these reasons, *Dugan* v. *Rank*, 372 U.S. 609 (1963), on which the government relied in the Court of Appeals and on which the Arizona petitioners rely here, is inapposite. That was a suit to enjoin a federal reclamation project; it did not involve a party's effort to adjudicate its federal water rights against a class of all other claimants of ownership or use rights to the water in a particular stream. The United States as defendant was a narrow target of a specific claim, rather than simply part of the universe of adverse claimants whose presence is necessary for a binding adjudication. See also *United States* v. *District Court for Eagle County*, 401 U.S. 520 (1971), and *United States* v. *District Court for Water Division No. 5*, 401 U.S. 527 (1971) (both holding the McCarran Amendment waiver applicable to supplemental or periodic adjudications in which fewer than all claims to a particular stream are resolved).

Finally, even if the United States were immune from joinder as a defendant in *Navajo Nation*, the tribe's federal action could and should still proceed in federal court. The United States might choose to intervene to assert its federal reserved rights. Cf. Senate Hearings, *supra*, at 3 (Department of Justice representative states that, when necessary for a complete adjudication, the United States will proceed as plaintiff or appear specially to evidence its interests). Even if it did not, the federal court's final judgment would directly bind all adverse claimants other than the United States, and it would have a substantial stare decisis effect on the federal government. The United States would not be obliged to relitigate the federal court's determination, and, based on the position the government has asserted here, it doubtless would not try to do so. Moreover, it would ill befit the United States, as

guardian of the tribes, to attempt to undermine the successful outcome of federal actions brought by its wards.

* * * *

For all the foregoing reasons, the Navajos should be permitted to proceed in federal court, whether or not the disclaimer provisions preclude state court jurisdiction. The Tribe's rights are federal rights on a federal reservation created by a federal treaty long before the State of Arizona ever existed. Congress has provided a federal forum for the determination of those rights, and the jurisdiction of the federal court has been properly and timely invoked for the sole purpose of deciding questions of federal law. Abstention is inappropriate in these circumstances.

CONCLUSION

The judgment of the Court of Appeals in *Navajo Nation* should be modified to direct the District Court to exercise its jurisdiction over the Tribe's federal claim. As so modified, the judgment should be affirmed.

Respectfully submitted,

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